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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RIGHTHAVEN, LLC, a Nevada limited liability company, Plaintiff, vs. KAYSE JAMA, an individual, and CENTER FOR INTERCULTURAL ORGANIZING, a Non-Profit Organization, Defendant.	CASE NO. 2:10-cv-01322-JCM-LRL **DEFENDANTS' OPPOSITION TO PLAINTIFF'S RESPONSE TO ORDER TO SHOW CAUSE AND, ALTERNATIVELY, REQUEST FOR A CONTINUANCE TO CONDUCT DISCOVERY PURSUANT TO FRCP 56(f)**

COME NOW, Defendants KAYSE JAMA, an individual, and CENTER FOR INTERCULTURAL ORGANIZING, by and through their attorneys of record, OLSON, CANNON, GORMLEY & DESRUISSEAUX, and hereby submit their Opposition to Plaintiff's Response to Order to Show Cause and, Alternatively, Request for a Continuance to Conduct Discovery Pursuant to FRCP 56(f).

This opposition is made and based upon the pleadings and papers on file herein, the points and authorities attached hereto, together with the arguments of counsel at the hearing of this motion.

I.

INTRODUCTION

At the request of this Court, Plaintiff, Righthaven, Inc. ("Righthaven") was ordered to show cause why the Defendants, KAYSE JAMA and CENTER FOR INTERCULTURAL ORGANIZING's (Collectively referred to as "CIO") alleged reproduction of a single newspaper article on its website does not constitute fair use. Throughout Righthaven's Response to the Court Order, there are numerous mistakes of fact and law that CIO feels compelled to highlight and correct for the Court's ease and understanding. Righthaven adamantly requests that the Court not only find in its favor, but also attempts to shift the burden to CIO to demonstrate why any such publication constitutes fair use. Righthaven is mistaken that the burden lies with CIO for the purpose of this Motion. The Court's *sua sponte* order is clear that Righthaven must demonstrate why CIO's activities do not constitute fair use under 17 U.S.C. §107.

Throughout the Brief in Response to the Order to Show Cause, Righthaven struggles with the standard upon which the Court will analyze this case. Solely for the purposes of this Show Cause hearing, CIO will concede that all facts alleged in the Complaint are accepted as true. Therefore, should the Court rule in favor of finding a fair use, it will have done so after taking all of Righthaven's allegations as true. Second, Righthaven also attempts to avoid the issue by seeking the proverbial second bite at the apple in requesting a continuance of this hearing, pending the opportunity to conduct further discovery pursuant to F.C.R.P. 56(f). Upon considering the Affidavit in Support of F.R.C.P. 56(f), there is no basis upon which to grant this request.

Should the Court analyze these issues under a F.R.C.P. 12(b)(6) Motion, it is tantamount to finding there are no issues of material fact under a F.R.C.P. 56(f) analysis. The issue before the

Court is straightforward and contains very little disagreement as to facts giving rise to Righthaven's Complaint.

While the fair use exception was codified under 17 U.S.C. §107, its application to the reposting of online Internet publications is at best, sparse. However, given the multitude of lawsuits filed by Righthaven, Nevada Federal Courts will have the opportunity to analyze this very issue for the foreseeable future. The current landscape of this lawsuit and the hundreds like it will grant the Court an opportunity to establish a standard upon which future Internet fair use lawsuits are analyzed. After reviewing the facts giving rise to this particular dispute, CIO is confident that the Court will find in favor of fair use.

II.

STATEMENT OF FACTS

Again, for purposes of this proceeding only, CIO will concede the facts as alleged in Plaintiff's Complaint. CIO's concession should in no way hinder its ability to proffer future evidence to refute these allegations in future hearings and/or trial. CIO is a non-profit organization headquartered in Portland, Oregon dedicated the education of immigrants, refugees and allies on local, national and global social justice issues. Unlike for-profit corporations, CIO is not motivated to increase profits or maximize shareholder wealth. Its philanthropic purpose seeks to assist immigrants and refugees in the transition of becoming citizens of the United States of America. In keeping with that purpose, CIO constantly updates it website with news, current events and other information impacting the transition to an American way of life.

In this case, and for purposes of this Show Cause hearing, CIO reproduced a single article that was previously posted on the Las Vegas Review-Journal "(Review-Journal") website. The article, "POLICE ARREST: Misdemeanor Violations Leading to Deportations," (the "Article") originally appeared on the Review-Journal wesbsite on June 28, 2010. The Article is greatly relevant to CIO's core purpose, and therefore reposted by CIO onto a blog on the CIO website on July 8, 2010. The title of the Article speaks for itself with regard to the relevance to CIO's constituency. While the Article is based on events occurring in Nevada, one can definitely understand its patent relevance. Upon learning of CIO's use, Righthaven immediately filed a lawsuit instead of issuing a cease and desist letter requesting CIO to remove the Article from its website.

Upon information and belief, to this very day, the Article is still available for anyone to read on the Review-Journal website. While viewing the Article today, as you could on June 28, 2010, any viewer can simply right click on the mouse to copy and paste the full text of the Article and reproduce it in other media. By implication, Righthaven, as assignee to the copyrighted material, has essentially consented to the reproduction of the articles posted on the Review-Journal website. Clearly, programs exist to allow website owners to preclude its viewers from copying and pasting the content onto other websites. The Review-Journal takes no steps to restrain visitors from undertaking the same efforts to copy and paste its articles onto third-party websites. Additionally, the website invites the readers to save copies of its articles onto personal computers and email articles to third parties by simply selecting a tab at the top of the page. Despite its granting website visitors the explicit right to replicate entire articles, Righthaven has brought this lawsuit and many more to achieve a simple purpose, maximization of profits.

As a non-profit organization, CIO freely allows visitors to access its web content without charging a membership fee or any other fee to access its content. Plaintiff claims that CIO's inclusion of donation banners on the website is equal to carrying out commercial activities. This notion is absurd. CIO, as a non-profit entity relies upon the generosity of its donors and members. By simply facilitating a website where individuals can easily make donations to its cause falls far from engaging commercial activities. After the Court has had an opportunity apply the undisputed facts of the this case to the four-pronged standard of 17 U.S.C. §107, CIO is confident the Court will find that the limited reproduction of a newspaper article for educational purposes constitutes fair use.

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III.

LEGAL ARGUMENT

For the limited purpose of responding to the Court's Order to Show Cause, CIO Parties will concede that it posted a created a blog on its website in which members could view the Article and discuss the impact of the story. In keeping with that purpose, the Court must analyze this case in light of the Review-Journal's original ownership of the Article. All prongs associated with the fair use analysis were specifically devised to protect the original copyright holders, not the succeeding profiteers. Therefore, while Righthaven may be the current holder of the Article, it was created solely to sue third-parties in an effort to limit any bad publicity that might accompany a lawsuit filed on behalf of the Review-Journal. Accordingly, the notion that Righthaven is fighting to preserve intellectual property is a mere ruse.

Fair use is a mixed question of law and fact. If no genuine issues of material fact exist, a reasonable trier of fact can reach, a court may conclude as a matter of law whether the challenged use qualifies as a fair use of the copyrighted work.[1] Because the Court is accepting all facts in the Complaint as true for purposes of this hearing, the determination of fair use is ripe for immediate consideration and should not be delayed under FRCP 56(f).

A. THE FOUR PRONG TEST UNDER 17 U.S.C. 107(1)-(4) FAVORS A FINDING OF FAIR USE.

"Fair use is an equitable rule of reason," which is to be applied in light of the statute.[2] 17 U.S.C. 107(1)-(4) instructs us to consider the following factors:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;

[1] *Hustler Magazine, Inc.*at 1150-1151.
[2] *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 448, 104 S.Ct. 774 (1984)

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.

These factors "are not meant to be exclusive."[3] Nor may [they] be treated in insolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.[4] "The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."[5] Courts balance these factors to determine whether the public interest in the free flow of information outweighs the copyright holder's interest in exclusive control over the work.[6] The following analysis will demonstrate CIO's posting of the Article was done for educational purposes and conferred no economic gain. Additionally, despite Righthaven's representations, CIO actually increased the Review-Journal market by exposing a new segment of customers to its already free website.

B. AS A NON-PROFIT INSTITUTION CIO IS SOLELY MOTIVATED TO ASSIST NEW AND PROSPECTIVE CITIZENS OF THE UNITED STATES.

Under the first prong of the test, the Court must consider the purposes and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes.[7] Unlike Righthaven, CIO was organized for philanthropic and educational purposes. Righthaven's attempt to spin CIO's mission is as transparent as its motive for filing this lawsuit. As a non-profit, educational institution, CIO gathers information from numerous sources to better inform its constituency about immigration and refugee issues. Generally, if a new work is used commercially rather than for a ***nonprofit purpose***, its use will less likely qualify as fair under the copyright statute.

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[3] *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 560, 105 S.Ct. 2218 (1985).
[4] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590, 114 S.Ct. 1164 (2d Cir.1994).
[5] *Campbell* at 577-578.
[6] *Hustler Magazine, Inc. v. Moral Majority, Inc.* 796 F.2d 1148, 1151, 230 U.S.P.Q. 646 (1986).
[7] 17 U.S.C. 107(1).

Here, rather than using the original work for pecuniary gain, CIO posted the Article to raise awareness on an issue that directly impacts the immigration community. As this Court is aware, immigration has been a hot button topic in the United States for a long time and will continue to be at the forefront for years to come. No region of the United States is immune or insulated from the impact of immigration enforcement or legislation. Generally, the scope of the fair-use doctrine is wider when the use relates to issues of public concern.[8] It is hard to imagine a better example of an issue affecting the public, at large than immigration reform.

Even assuming that the use had a purely commercial purpose, the presumption of unfairness can be rebutted by the characteristics of the use.[9] Therefore, if one follows Righthaven's red-herring and deems the website donation banners to constitute some semblance of commercial activity, such activities do not constitute *per se* copyright infringement. Even in cases where the alleged copyright infringer gains commercially, Courts may consider the public benefit resulting from the use in finding in favor of fair use.[10] The scope of fair use is greater when "informational" as opposed to more "creative" works are involved.[11] In this case, the Article was not the result of the creative expression of its author. Instead, the substance of the Article was based in fact and contained no opinion based commentary by the author.

C. THE FACT BASED ARTICLE DIRECTLY IMPACTS CIO'S CONSTITUENCY AND CONTAINS LITTLE CREATIVE EXPRESSION.

The second prong of the test requires Court to assess the nature of the copyrighted work.[12] Thus, a work that is fact based, rather than opinion based, favors a finding of fair use. CIO certainly respects the underlying policy of protecting the interests of the original author of copyright holder. Creative efforts should be protected, however, as Righthaven certainly understands, there is a substantial public benefit to allowing reproduction of certain works. There is no better example than the one presented before this Court. The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.[13] The Article focuses on what is commonly known as the "287(g) Partnership" formed by the Las Vegas Metropolitan Police Department and the U.S. Immigration and Customs Enforcement. The supposed intent of 287(g) was to target violent illegal immigrants for deportation. The Article, authored by Review-Journal reporter, Lynnette Curtis, focuses on the proportionality of inmates who are facing potential deportation currently detained for misdemeanor violations versus violent, "higher-level" immigrants. The Article contains a number of statistics and numerous quotes from interviews with various law enforcement members and American Civil Liberties Union employees.

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[8] *National Rifle Ass'n of America v. Handgun Control Federation of Ohio*, 15 F.3d 559, 1994 FED App. 0028P (6th Cir. 1994).
[9] *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171 (5th Cir.1980).
[10] *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).
[11] *Hustler Magazine Inc., v. Moral Majority, Inc.*, 796 F.2d 1148 (1986).
[12] 17 U.S.C. §107(2).

Righthaven acknowledges that the Article is based on fact, but that the manner in which the content was structured and articulated demonstrates considerable creativity. Although a clever argument, this is not the case. If the legislative intent of the statute was to apportion considerable weight to the "structure" of a news reporting article, there would never be an instance in which Courts can find in favor of fair use. Every news report requires its author to structure and present facts to its reader. Righthaven also claims that Article contains "highly expressive attributes." While the Article contains the opinions of law enforcement members and ACLU members, it does not contain any opinions of Ms. Curtis. The apparent purpose of the Article is to inform the reader of how the 278(g) Partnership is being applied and enforced within the Las Vegas community. The Article is not an editorial or op-ed in nature. Therefore, despite Righthaven's claim that Ms. Curtis contributed substantial creativity to the Article, the second factor favors a finding of fair use.

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[13] *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S.Ct. 774 (1984).

D. WHILE THE ARTICLE WAS REPRODUCED IN ITS ENTIRETY, IT WAS DONE FOR EDUCATIONAL PURPOSES AND WITH THE IMPLIED CONSENT OF THE REVIEW-JOURNAL.

The third prong under 17 U.S.C. 107 requires the Court to consider the amount and substantiality of the amount of the work used. Righthaven incorrectly claims that the 100% replication of the Article can only yield a finding against fair use is a misstatement of well-settled caselaw. Like the analysis at large, the amount of the work is balanced with the purpose of the replication. *Sony Corp.* teaches us that the copying of an entire work does not preclude fair use *per se*.[14] In this case, CIO posted the Article on a blog to encourage its readers to comment and critique law enforcement's approach to dealing with non-violent, illegal immigrants. Discussion boards, blogs and other media that encourage and raise public awareness of important issues should be encouraged, not stifled. Statements reproduced in the Article clearly highlight the importance of these issues to the immigration community. According to Ms. Curtis' interview with Las Vegas immigration attorney, Peter Ashman, "Programs such as 287(g) tend to have a chilling effect on the immigrant community..."

The Review-Journal implicitly grants its readers the right to disseminate its articles to third parties. While the consent may not be explicit, it can be inferred from the Review-Journal's conduct. Rather than institute measures to ensure website visitors do not copy and paste articles onto other websites, the Review-Journal seemingly invites third parties to do just that. The Review-Journal actually invites its readers to email copies of its articles to third party recipients. Without exception, readers can share articles with third parties by selecting an icon that is simply labeled "email this" at the top of each webpage. Readers are also invited to save copies of the article onto their own personal computers. On one hand, Righthaven encourages its readers to disseminate its articles to third parties, but considers the posting onto a blog copyright infringement. If CIO would have selected the "email this" icon and sent the article to all of its registered members, Righthaven surely could not complain about the manner in which it was disseminated.

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[14] *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (1986).

Therefore, the Court should find that, despite CIO's complete replication of the Article, the educational benefit afforded to CIO's members far outweighs a finding against fair use.

E. CIO'S USE OF THE WORK ACTUALLY PROMOTES THE LAS VEGAS REVIEW-JOURNAL.

Pursuant to 17 U.S.C. 107(4), the Court must determine whether CIO's use adversely affects the potential market for the copyrighted work. In light of the specific facts of this use, the Court can easily conclude that CIO actually benefits the Review-Journal. Despite Righthaven's claims that CIO adversely impacted the Review-Journal market, CIO's use of the Article actually exposed a new segment of people to the Review-Journal's website. It is reasonable to infer that CIO's website visitors are likely to visit the Review-Journal to stay abreast on other immigration issues that could potentially impact them. Moreover, based upon the allegations of the Complaint, the reproduction did not occur until ten days after the Review-Journal posted the Article on its own website. CIO delayed any alleged republication until after the Review-Journal had the opportunity to provide the Article to its own subscribers. As a result, CIO offered little competition to the Review-Journal's initial market. Therefore, the Court should find in favor of fair use on the fourth prong of the test.

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F. THE DECISION RENDERED IN *WORLDWIDE CHURCH OF GOD V. PHILADELPHIA CHURCH OF GOD* IS DISTINGUISHABLE FROM THE CURRENT MATTER AND WARRANTS LIMITED APPLICATION TO THE FAIR USE ANALYSIS.

Righthaven takes great effort to analogize the current matter to the 9th Circuit decision rendered in *Worldwide Church of God v. Philadelphia Church of God.*[15] A fair use analysis is dependent on the individual merits of each case and this case is no different. The *Worldwide* matter consisted of very different issues that have little application to the instant matter.

The original work in *Worldwide* was authored by Herbert Armstrong ("Armstrong"), a spiritual leader of the Worldwide Church of God ("WCG"). Although he authored the work *Mystery of the Ages ("MOA")*, the copyright was held in the name of WCG. In *Worldwide*, the Court was charged with determining whether appropriation of an entire book for distribution to church members constituted fair use. After Armstrong's death, WCG discontinued dissemination of MOA because WCG changed its positions on several religious doctrines. In 1989, two former WCG pastors formed their own church, the Philadelphia Church of God ("PCG") seeking to preserve Armstrong's ideals. PCG claimed to strictly follow the teachings of Armstrong, and in keeping with that purpose, began copying MOA for its own use. PCG copied MOA verbatim and distribute approximately thirty thousand copies to its members. In return, many PCG members gave substantial contributions from people who received a copy of MOA.

Unlike the Article at issue in this matter, MOA consists of seven lengthy chapters devoted to discussion of Armstrong's controversial religious opinions. MOA has been described by some as a compendium of theological concepts as articulated by Armstrong. Given the controversy surrounding MOA and other beliefs associated with WCG, the theories espoused in MOA are based on one man's opinions, unlike the fact reporting contained in the Article. This wide discrepancy between the type and substance of the Article requires the Court to reject any idea that the *Worldwide* holding is controlling.

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[15] *Worldwide Church of God v. Philadelphia Church of God*, 27 F.3d 1110, 56 U.S.P.Q.2d 1259 (2000)

G. NEVADA FEDERAL COURTS HAVE ALREADY FOUND AGAINST RIGHTHAVEN AND DETERMINED RESPOSTING ARTICLES ON INTERNET BLOGS CONSTITUTES FAIR USE.

On October 19, 2010 Judge Larry Hicks considered a motion to dismiss in the lawsuit identified as *Righthaven, LLC v. Realty One Group, Inc.*, Case No. 2:10-cv-1036-LRH-PAL. In the *Realty One* matter, Righthaven brought suit against a website owner who reposted a Review-Journal newspaper article on its blog. The *Realty One* matter found that blog was both commercial and educational in nature. While the blog provided information to potential and current homeowners, the underlying purpose of providing the information was to create business for the licensed realtor. Although the Court found against fair use on that issue, the Court should find in favor of fair use in the instant case because there was absolutely no commercial activity linked with CIO blog. Unlike the website owner in the *Realty One*, CIO is non-profit organization that is solely devoted to educational purposes. Therefore, the Court should follow Judge Hicks' decision and find in favor of fair use.

H. THE COURT SHOULD DENY RIGHTHAVEN'S REQUEST FOR A CONTINUANCE OF THE HEARING PURSUANT TO FRCP 56(f) AND THE IMPROMPTU REQUEST TO AMEND THE COMPLAINT.

Righthaven's request for a continuance of the hearing to conduct discovery pursuant to FRCP 56(f) is nothing more than a delay tactic intended to coerce settlement from the defendants. The Declaration of Shawn Mangano, Esq. in support of the FRCP 56(f) generally states that Righthaven intends to take depositions and issue written discovery to ascertain economic and non-economic benefits, prior claims of threatened infringement and website traffic received during the time of the alleged infringement. Whether CIO was threatened with prior claims of infringement is irrelevant to this matter and not relevant to the four prong test under 17 U.S.C. §107. Likewise, nothing in the statute requires the Courts to consider the amount of viewership. Again, these red-herring arguments must be rejected.

Righthaven's request to conduct discovery on CIO's economic status is irrelevant in light of CIO's non-profit status. In its brief, Righthaven acknowledges CIO as a non-profit organization fully supported by donations and membership dues. Therefore, the Court should deny Righthaven's request to conduct discovery pursuant to FRCP 56(f) and properly make a determination on the fair use issue.

I. IN THE EVENT THE COURT IS INCLINED TO FIND IN FAVOR OF FAIR USE AND DISMISS THIS LAWSUIT, RIGHTHAVEN'S REQUEST TO AMEND ITS COMPLAINT SHOULD BE DENIED.

Righthaven also requests the Court to allow it toamend its Complaint should the Court be inclined to find in favor of fair use. Again, this is merely another delay tactic. The Court's dismissal of the *Realty One* lawsuit has caused Righthaven to grow fearful of another adverse ruling that will deal a devastating blow to its business model. By finding in favor of CIO, the Court is not bound to find against fair use in future lawsuits. However, the Court must consider the individual merits of this case and dismiss this lawsuit after finding in favor of fair use.

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IV.

CONCLUSION

For the reasons stated herein, the Court should declare CIO's use as fair use and dismiss the Complaint. Moreover, because the Court is accepting all allegations in the Complaint as true, there are no issues of material fact that should preclude summary judgment. Finally, Righthaven's request for a continuance pursuant to FRCP 56(f) should be denied as no discovery is necessary to the fair use analysis.

DATED this 14 day of December, 2010.

OLSON, CANNON,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ____ day of December, 2010, I served the foregoing, **DEFENDANTS' OPPOSITION TO PLAINTIFF'S RESPONSE TO ORDER TO SHOW CAUSE AND, ALTERNATIVELY, REQUEST FOR A CONTINUANCE TO CONDUCT DISCOVERY PURSUANT TO FRCP 56(f),** on:

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through the CM/ECF system of the United States District Court for the District of Nevada (or, if necessary, by U.S. Mail, first class, postage prepaid), upon the following:

[signature]
AN EMPLOYEE OF OLSON, CANNON, GORMLEY & DESRUISSEAUX